

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
KENNETH CULLEN	:	ORDER
	:	DTA NO. 820077
for Redetermination of a Deficiency or For Refund of New	:	
York State and New York City Personal Income Taxes	:	
under Article 22 of the Tax Law and the New York City	:	
Administrative Code for the Years 1998, 1999 and 2000.	:	

Petitioner, Kenneth Cullen, 37-26 68th Street, Woodside, New York 11377, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income taxes under Article 22 of the Tax Law and the New York City Administrative Code for the years 1998, 1999 and 2000.

On August 26, 2004, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.9(a)(4). On September 9, 2004, petitioner submitted documents in opposition to dismissal. Following the granting of a 30-day extension to October 25, 2004, the Division of Taxation, by Christopher C. O'Brien, Esq. (John E. Matthews, Esq., of counsel), submitted documents in support of dismissal on October 5, 2004. Pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4), the 90-day period for issuance of this order commenced October 5, 2004. After due consideration of the documents and arguments submitted, Thomas C. Sacca, Administrative Law Judge, renders the following order.

ISSUE

Whether petitioner filed a timely petition with the Division of Tax Appeals following the issuance of a conciliation order.

FINDINGS OF FACT

1. Petitioner, Kenneth Cullen, filed a request for a conciliation conference with the Bureau of Conciliation and Mediation Services ("BCMS") in protest of Notices of Deficiency L-022074259, L-022074267 and L-022074290, dated March 6, 2003. The request was received by BCMS on February 18, 2004.

2. Petitioner's request for a conference lists the following as his address:

Kenneth Cullen
3726 68th Street
Woodside, New York 11377-2853

3. Petitioner's request for conference also lists the following as his representative's name and address:

David H. Singer, Esq.
225 Broadway - Suite 500
New York, New York 10007

4. BCMS issued a Conciliation Order to petitioner (CMS No. 201209) dated March 5, 2004, which denied petitioner's request for a conciliation conference. The conciliation order stated that as the notices were issued on March 6, 2003, and the request was not received until February 18, 2004, or in excess of the 90-day requirement of the Tax Law, the request was considered late filed.

5. On July 6, 2004, petitioner filed a petition with the Division of Tax Appeals seeking an administrative hearing. According to the petition, the notices of deficiency were invalid as they were not mailed to petitioner's last known address.

6. On August 26, 2004, the Petition Intake, Review and Exception Unit of the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition to petitioner. The Notice of Intent to Dismiss Petition indicated that the Conciliation Order in this matter was issued on March 5, 2004, but that the petition was not filed until July 6, 2004, or 123 days later.

7. In response to the issuance of the Notice of Intent to Dismiss Petition, petitioner submitted an Objection to Dismissal of Petition and supporting documentation which claimed that the notices of deficiency were not mailed to the last known address of petitioner and were, therefore, invalid. Petitioner explained that the request for conciliation conference was filed with full knowledge that BCMS did not have statutory authority to hear the request. According to petitioner, the dismissal of the request was not based upon a hearing, but rather a lack of jurisdiction, since the statutory period had expired. It is only the Division of Tax Appeals that has the authority and jurisdiction to make a determination as to whether the notices of deficiency were issued in a proper manner. Petitioner emphasizes that the petition filed is not from an order of the conciliation conferee, nor an appeal of the dismissal of the request for conciliation conference, but is rather a direct appeal of the validity of the notices of deficiency dated March 6, 2003.

8. In response to the issuance of the Notice of Intent to Dismiss Petition, the Division submitted the affidavits of Bruce Peltier and Robert Farrelly, both employees of the Division. The Division also submitted a copy of petitioner's Request for Conciliation Conference, a copy of the certified mail record ("CMR") containing a list of the conciliation orders allegedly issued by the Division on March 5, 2004, and a copy of the subject March 5, 2004 Conciliation Order.

9. The affidavit of Robert Farrelly, Assistant Supervisor of Tax Conferences of BCMS, sets forth the Division's general procedure for preparing and mailing conciliation orders. This

procedure culminates in the mailing of the orders by United States Postal Service (“USPS”) certified mail and confirmation of the mailing through the receipt by BCMS of a postmarked copy of the CMR.

10. The BCMS Data Management Services Unit prepares and sends the conciliation orders and the accompanying cover letter, predated with the intended date of mailing, to the appropriate conciliation conferee for signature, who in turn, forwards the order and covering letter to a BCMS clerk assigned to process the conciliation orders.

11. The name, mailing address, order date and BCMS number for each conciliation order to be issued are electronically sent to the Division of Taxation’s Advanced Function Printing Unit (AFP). For each mailing, the AFP Unit assigns a certified control number and produces a cover sheet that indicates the BCMS return address, date of mailing, taxpayer’s name, mailing address, BCMS number, certified control number, and certified control number bar code.

12. The AFP Unit also produces a computer-generated CMR entitled “Assessments Receivable, Certified Record for Presort Mail.” The CMR is a listing of taxpayers and representatives to whom conciliation orders are sent by certified mail on a particular day. The certified control numbers are recorded on the CMR under the heading “Certified No.” The BCMS numbers are recorded on the CMR under the heading “Reference No.” and are preceded by three zeros. The AFP Unit prints the CMR and cover sheets via a printer located in BCMS and these documents are delivered to the BCMS clerk assigned to process conciliation orders.

13. The clerk, as part of her regular duties, associates each cover sheet, conciliation order, and covering letter. The clerk verifies the names and addresses of taxpayers with the information listed on the CMR and on the cover sheet. The clerk then folds and places the cover

sheet, covering letter, and conciliation order into a three-windowed envelope where the BCMS return address, certified control number, bar code, and name and address of the taxpayer appear.

14. On the last page of the CMR the BCMS clerk stamps "Post Office Hand write total # of pieces and initial. Do Not stamp over written areas" and also stamps "Mailroom: Return Listing To: BCMS Bldg 9 Rm 180 Att: Conference Unit."

15. The BCMS clerk also writes the date of mailing of the conciliation orders listed on the CMR at the top of each page of the CMR. In this case "3/5/04" is written in the upper right corner of each page of the CMR.

16. The CMR, along with the cover sheets, covering letters, and conciliation orders are picked up, in BCMS, by an employee of the Division's Mail Processing Center.

17. Mr. Farrelly attested to the truth and accuracy of the copy of the four-page CMR attached to his affidavit which contains a list of the conciliation orders assertedly issued by the Division on March 5, 2004. This CMR lists 37 certified control numbers and there are no deletions from the list. Each such certified control number is assigned to an item of mail listed on the four pages of the CMR. Specifically, corresponding to each listed certified control number is a notice number, the name and address of the addressee, and postage and fee amounts.

18. Information regarding the conciliation order issued to petitioner is contained on page three of the CMR. Specifically, corresponding to certified control number 7104 1002 9730 0000 0259 is reference/CMS number 000201209, along with the following address:

Kenneth Cullen
3726 68th Street
Woodside, New York 11377-2853

19. Page one of the CMR also contains information regarding a conciliation order issued to petitioner's representative. Specifically, corresponding to certified control number 7104 1002

9730 0000 0051 is reference/CMS number 000201209 along with the name and address of petitioner's representative as follows:

David H. Singer
225 Broadway - Suite 500
New York, New York 10007

20. The affidavit of Bruce Peltier, Mail and Supply Supervisor in the Registry Unit of the Division's Mail Processing Center, attests to the regular procedures followed by his staff in the ordinary course of business of delivering outgoing mail to branch offices of the USPS. More specifically, after a conciliation order is placed in the "Outgoing Certified Mail" basket in the Mail Processing Center, a member of the staff weighs and seals each envelope and places postage and fee amounts on the letters. A clerk then counts the envelopes and verifies the names and certified mail numbers against the information contained on the CMR. Thereafter, a member of the staff delivers the stamped envelopes to a branch of the USPS in Albany, New York. A postal employee affixes a postmark and/or his or her initials or signature to the CMR indicating receipt by the post office.

21. In this particular instance, the postal employee affixed a postmark dated March 5, 2004 to each page of the four-page CMR. The postal employee also wrote his or her initials on each page of the CMR and circled the number "37" contained on page 4 of the CMR where it states "total pieces received at post office."

22. Mr. Peltier states that the CMR is the Division's record of receipt, by the USPS, for pieces of certified mail. In the ordinary course of business and pursuant to the practices and procedures of the Division's Mail Processing Center, the CMR is picked up at the post office by a member of Mr. Peltier's staff on the following day after its initial delivery and is then delivered

to the originating office, in this case BCMS. The CMR is maintained by BCMS in the regular course of business.

23. Based upon his review of the affidavit of Robert Farrelly, the exhibits attached thereto and the CMR, Mr. Peltier states that on March 5, 2004, an employee of the Mail Processing Center delivered a piece of certified mail addressed to Kenneth Cullen, 3726 68th Street, Woodside, New York 11377-2853 and a piece of certified mail addressed to David H. Singer, 225 Broadway - Suite 500, New York, New York 10007, to a branch of the USPS in Albany, New York in sealed envelopes for delivery by certified mail. He states that he can also determine that a member of his staff obtained a copy of the CMR delivered to and accepted by the post office on March 5, 2004 for the records of BCMS. Mr. Peltier asserts that the procedures described in his affidavit are the regular procedures followed by the Mail Processing Center in the ordinary course of business when handling items to be sent by certified mail and that these procedures were followed in mailing the pieces of certified mail to petitioner and his representative on March 5, 2004.

CONCLUSIONS OF LAW

A. A petition contesting notices of deficiency of personal income tax due must be filed within 90 days after the date of mailing of the notices (Tax Law § 689[b]). In the alternative, a taxpayer may request a conciliation conference in BCMS. The time period for filing such a request is also 90 days (*see*, Tax Law § 170[3-a][a]). A conciliation order is binding on both the Division and the taxpayer unless the taxpayer petitions for a hearing within 90 days from the date of the issuance of the conciliation order (Tax Law § 170[3-a][e]). A conciliation order is “issued” within the meaning of Tax Law § 170(3-a)(e) at the time of its mailing to the taxpayer (*Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002). The filing of a petition within this

time frame is a prerequisite to the jurisdiction of the Division of Tax Appeals which has no authority to consider a petition which is not filed within 90 days of the issuance of a conciliation order (*Matter of DeWeese, supra*).

B. Where the taxpayer files a petition, but the timeliness of the petition is at issue, the Division has the burden of proving proper mailing of the conciliation order (*see, Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). The mailing evidence required of the Division is two-fold: first, there must be proof of a standard procedure used by the Division for the issuance of orders by one with knowledge of the relevant procedures; and second, there must be proof that the standard procedure was followed in the particular instance in question (*see, Matter of Katz, supra; Matter of Novar TV & Air Conditioner Sales & Serv., supra*).

C. The affidavits of two Division employees, Robert Farrelly and Bruce Peltier, provide adequate proof of the Division's standard mailing procedure for the mailing of conciliation orders by certified mail. The affidavits generally describe the various stages of producing and mailing conciliation orders, and, in addition, attest to the authenticity and accuracy of the copies of the conciliation order and the certified mail record submitted as evidence of actual mailing. These documents establish that the general mailing procedures described in the Farrelly and Peltier affidavits were followed with respect to the Conciliation Order issued to petitioner and his representative. Petitioner's and his representative's names, addresses and the CMS No. appear on pages three and one, respectively, of the certified mail record which bears a USPS date stamp of March 5, 2004 along with the initials of a Postal Service employee. There are 37 certified control numbers listed on the CMR, and the USPS employee indicated that he received 37 items for mailing. The Division has, therefore, established that it mailed the Conciliation

Order to petitioner and his representative by certified mail on March 5, 2004 (*Matter of DeWeese, supra*).

D. The petition was received on July 6, 2004. Accordingly, it is found that the petition was filed more than 90 days after the mailing of the Conciliation Order. Since the petition was not mailed to the Division of Tax Appeals within the statutory 90-day period, the Division of Tax Appeals has no authority to hear petitioner's challenge to the Conciliation Order.

Petitioner correctly states that the Division of Tax Appeals has the authority to determine whether the notices of deficiency were properly issued to petitioner. However, to make such a determination, proper jurisdiction over the matter at issue must be conferred by the filing of a timely petition with the Division of Tax Appeals. As petitioner failed to file a timely petition, the Division of Tax Appeals lacks the necessary authority to review the issuance of the notices of deficiency.

E. Finally, it is noted that petitioner is not without recourse here, for he may pay the disputed tax and, within two years from the date of payment, apply for a refund (Tax Law § 687[a]). If his request for a refund is denied, petitioner may then proceed with another petition requesting a hearing or conciliation conference (Tax Law § 689[c]; § 170[3-a][a]; *Matter of Rosen*, Tax Appeals Tribunal, July 19, 1990).

F. The petition of Kenneth Cullen is dismissed with prejudice.

DATED: Troy, New York
December 2, 2004

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE